Supreme Court of the United States

OCTOBER TERM 1958

No. 34

WILLARD UPHAUS, Appellant

v.

LOUIS C. WYMAN

Attorney General of New Hampshire, Appellee

Appeal from the Supreme Court of The State of New Hampshire

BRIEF FOR APPELLEE

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STATEMENT OF THE CASE

Willard Uphaus, a resident of Hartford, Connecticut and Executive Director of World Fellowship, Inc., a voluntary corporation incorporated under the laws of the State of New Hampshire, was called to testify on June 3, 1954, in executive session, in a State investigation to determine whether there were subversive persons or subversive organizations in New Hampshire. Subsequently, on September 27, 1957, Uphaus was recalled and further questioned, again in private session. On the second occasion he was subpoenaed *duces tecum* and asked to produce for

examination by the legislative committee the names of persons who attended World Fellowship and primary correspondence with persons who were asked to and in fact did speak at World Fellowship. The latter category involved correspondence with not more than twenty persons. [T. 54, 57] Both the correspondence and the guest cards were readily available and assembled. [T. 71, 73]

When the witness refused to produce the correspondence or the guest cards the matter was transferred to the Superior Court [T. 1] in accordance with New Hampshire law, and after full hearing before the Superior Court at which time the law was found constitutional and the questions pertinent, Uphaus was directed by the Court to produce the documents and papers. Upon his continued refusal he was held to be in contempt of court and was admitted to bail in the modest sum of fifteen hundred dollars. [T. 94] The cause was heard in the Supreme Court of New Hampshire on December 4, 1956 and the right of the State to the information upheld [T. 95], whereupon Uphaus appealed to this Honorable Court. For the sake of ready reference the chronology of this case is as follows:

1. Appellant first questioned in Executive Session June 3, 1954
2. Subpoenas served September 10, 1954
3. Appellant refused to produce the documents called for by the subpoena September 27, 1954
4. Appellee filed a petition in the Superior Court of Merrimack County to enforce the subpoenas October 20, 1954
5. Appellant appeared again in Executive Session and again refused to comply with the subpoena August 31, 1955
6. Supreme Court of New Hampshire decided a jurisdictional issue in favor of Appellant (*Wyman* v. *Uphaus*, 100 N. H. 1) September 28, 1955
7. Petition to Superior Court of Merrimack County brought by Appellee pursuant to

Chapter 491, sections 19 and 20 of the *New Hampshire Revised Statutes Annotated* in order to compel Appellant's compliance with the subpoenas. The case was heard January 5, 1956

8. Appellant adjudged in contempt and ordered committed to the Merrimack County Jail until purged of contempt; released on bail January 5, 1956

9. Appellant appealed to Supreme Court of New Hampshire, which upheld the court below (*Wyman v. Uphaus*, 100 N. H. 436) February 28, 1957

10. Appellant appealed to the United States Supreme Court, and without oral arguments the judgment below was vacated and the case remanded to the New Hampshire Supreme Court October 14, 1957

11. Upon Appellee's motion for reinstatement of the judgment against Appellant the New Hampshire Supreme Court reaffirmed its former opinion (*Wyman v. Uphaus*, 101 N. H. 139) November 15, 1957

12. Appellant appealed to the United States Supreme Court filing a Jurisdictional Statement February 8, 1958

13. Appellee filed Motion to Dismiss March 7, 1958

14. Probable jurisdiction noted and case set down for oral argument April 7, 1958

QUESTIONS PRESENTED

This case is solely concerned with the two subpoenas *duces* by a state legislative investigating committee calling for a guest

list and certain correspondence with speakers of subpoenaed witness, Willard Uphaus, Executive Director of World Fellowship, Inc., a voluntary New Hampshire corporation.

The issues appear to be:

1. Whether *Pennsylvania* v. *Steve Nelson*, 350 U.S. 497, invalidated even those separate portions of State sedition statutes that regulate and prohibit subversion directed against or involving the State as distinct from the United States.

   a. Whether such a holding itself, if to be implied, is constitutional.

2. Whether the decision in *Pennsylvania* v. *Nelson* "suspending the enforceability" but not voiding State sedition laws has any relation to or effect upon the State Legislature's power to *investigate* subversion against (a) the United States within that State or (b) against the State within that State?

3. Whether the subpoenas *duces* are void for indefiniteness, for lack of pertinency, or violative of due process by invading the witness' privacy without justifiable State interest?

   a. Whether *Sweezy* v. *New Hampshire*, 354 U. S. 234, invalidates the present investigation in its entirety.

4. Whether a conditional (de bene) commitment for contempt of court in refusing to produce court-adjudged relevant documents, in existence and readily available, where the witness may be discharged by compliance and where the witness did not claim his privilege against self-incrimination, is a "cruel and unusual punishment".

5. Whether if a question is adjudged by a court after full hearing to be relevant to a constitutional legislative fact-finding investigation, the First Amendment continues there after to be available to a witness as a valid basis for refusal to answer.

Respondent respectfully believes and submits that the answers to all of the foregoing on the record in this case should be in the negative.

SUMMARY OF ARGUMENT

The constitutional power and authority of a State to investigate in aid of State legislation is undeniable. Neither *Pennsylvania v. Nelson*, 350 U.S. 497, 100 L.Ed. 640, 76 S.Ct. 477, nor *Sweezy v. New Hampshire*, 354 U.S. 234, 1 L.Ed.2d 1311, 77 S. Ct. 1203, prohibits such fact-finding power to a State legislature. Whether or not State sedition laws insofar as they relate to overthrow of the United States are themselves suspended as to enforceability by the former decision, there is much permissible State legislation which may directly result from facts developed from legislative investigation of subversive activities within a State. Thus, immunity acts, registration statutes, legislation to provide a State agency regulating suspension or revocation of the franchise of a corporation engaged in subversive activities within the State, measures to deal with subversive instigation of riot, insurrection or public disturbance, as well as legislation dealing exclusively with attempts to overthrow the State Government itself or any political subdivision within the State, by force and violence or other unlawful means, are proper grist for any legislative mill.

All that is before the Court on the present appeal is whether the subpoenas *duces tecum* for the correspondence and guest list involve any federal unconstitutionality. The State Supreme Court has said that no State unconstitutionality is involved. (T. 94) It has also said there is no violation of the Federal Constitution, and as to this Appellant seeks reversal by this Court. That the

subpoenas ask for information which is relevant to an investigation of subversion is here crystal clear. Included within the record before this Court (because it was before the Superior Court upon the occasion of the proceedings commencing in the transcript at Page 3 and continuing through Page 94) was the *Report of the Attorney General of New Hampshire* to the Legislature on January 5, 1955, with more than forty-five pages devoted to the protracted and substantial record of affiliation with, support of, or membership in, repeated organizations cited as subversive or Communist-controlled by Federal agencies on the part of named individuals who spoke at World Fellowship, Inc. during the 1954 and 1955 seasons covered by the subpoenas under consideration. The repeated, prolonged, and curiously proximate meetings and lectures at World Fellowship by persons such as William Hinton, Julian Schumann, etc., etc. may not logically be dismissed as mere coincidence. The State of New Hampshire has the right to know whether it was coincidence or plot, dissent or subversion.

The State Legislature beyond all question wants the information which is sought by these subpoenas. The State of New Hampshire is concerned to learn whether there is activity at World Fellowship, Inc. dangerous to the security of the State Government of New Hampshire.

This concern is genuine. It is based on a substantial record. It is neither reasonable nor fair to dismiss it as official nightmare. Asking questions relating to who was in attendance at World Fellowship, Inc. seeking to determine whether there is or has been subversion or advocacy of subversion as defined in a clear State statute (RSA 588) does not in any way abridge genuine freedom of speech, or association, or Appellant's freedom of religion. Whether appellant's protestations of inquisition are mere sham is perhaps best determined in light of the Attorney General's *Report to the General Court of New Hampshire of January 5, 1955*, pages 130 - 175. Whether or not sincere, the reasonable right and power of the State to inquire must remain sanctioned by judicial decision. Surely the test of fact-finding authority should never rest on the subjective state of mind of a witness.

Here there is no need to decide whether sedition within the State of New Hampshire against the United States is necessarily sedition against the State of New Hampshire. Respondent briefed and argued the affirmative of this proposition in his brief and Motion for Rehearing filed with this Court in *Commonwealth of Pennsylvania* v. *Steve Nelson*, 350 U.S. 497, 100 L.Ed. 640, 76 S. Ct. 477, on behalf of more than three-quarters of the States. The right of the State to *investigate* activities of organizations operating within State borders seeking to determine whether such activity endangers State security must be undeniable. This right and power to *investigate* is reserved to the States by the *Tenth Amendment*, whether or not power to legislate in proscription of subversion against the United States is presently limited by language in *Pennsylvania* v. *Nelson, supra*, since neither holding nor language therein limits the right of any State to *investigate* as distinct from prosecute.

Appellant's actvities do not represent some kind of game of hide and seek within or behind a conventional (lawful) political party. Nor has the concern of the State of New Hampshire in this matter involved the exercise of arbitrary authority nor unreasonable interference with private rights. No one has been pushed around in New Hampshire. Appellant has not been abused, directly or indirectly.

The Legislature and the people of New Hampshire believe that Communism and Communist activity involves a serious danger to State sovereignty. They believe (as witness the language of the *Preamble* to the *Act of 1951* set forth at length in Appellant's brief at Page 23) that continuing surreptitious activity of the Communist Party or of individual Communists within the State of New Hampshire as well as throughout the United States can involve the urgent question of the survival of all of the States in a free republican form of government under the Federal Constitution.

The principle that the interest of a State in such circumstances is a vital concern is of transcendent importance: American jurisprudence in this field should rest upon the clearly expressed basic American concept that it is the responsibility of every

American citizen to answer in response to relevant questioning in the field of loyalty and security, subject always to his right to honestly take the Fifth Amendment. *Investigation of subversive activity is not investigation of lobbying or candy-making or economics of labor organizations or other day-to-day functions.* Against the backdrop of world history and international affairs showing beyond all reasonable doubt the open, calculated, notorious enmity of the Soviet Union for all things American and free, it is literally pressing that this principle should by this Court be announced as one of the concomitants of American citizenship.

As the New Hampshire Supreme Court has said in declining to reverse its original decision in the principal case (T. 129):

> "We are loath to believe that under the federal constitution a state does not have the right to protect itself against subversion by inquiry of the sort provided for by our legislature. The implications of such a conclusion are so grave and so at variance with what we have considered to be the settled law that we feel any ruling to this effect must come from another tribunal than ours."

In *Sweezy* v. *New Hampshire*, 354 U. S. 234, L.Ed. 2d 1311, 77 S.Ct. 1203, a separate opinion by the Chief Justice, with Mr. Justice Black, Mr. Justice Douglas, and Mr. Justice Brennan, after stating that merely summoning a witness and requiring disclosure of the nature of past expressions and associations was a measure of governmental interference in the right to associate with others and that constitutionally protected freedoms had been abridged through the same investigation as is involved in the principal case, stated:

> "We do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields. But we do not need to reach such fundamental questions of state power to decide this case . . . ."

The State interest involved is its right to take reasonable precautionary measures to insure its own survival as a free govern-

ment. The ways, wiles and devious practices of the fellow-traveller and intellectual Communist sympathizer many of whom are far too clever (with the sanction and approval of the Party itself) to be or ever have been an actual member of the Communist Party, requires the most careful of cross-examination in fact-finding investigation in order to separate the wheat from the chaff in fact-finding and to test the validity of empirical denials of subversion by a witness. Perhaps these people all met in New Hampshire at Appellant's camp just to smoke the pipe of international peace and brotherhood. Perhaps they did not. The Legislature of New Hampshire does not know. It has not yet been given even the elementary information it seeks in the principal case, of who was there. Reasonable, rational and sensible requirements of due process require no holding that the right of the State is to be thwarted by judicial creation of an individual right of privacy which extends even to protection against relevant responsible inquiry into *subversion*. The most vital of State interests is involved. A decision from this Court clearly affirming to the States of this Union the power to investigate *subversion* within their borders—reasonably, fairly, and yet firmly—is urgently needed for mutual security and common public advantage. We ask this not only for New Hampshire but for every other State in this Union. We ask it for the security, welfare and protection of the Union itself.

Certain decisions of this Court relied upon by Appellant in his brief as a bar to such inquiry as here at issue upon close analysis involve much dicta. This dicta if to become law of the land would weaken national and state security programs substantially and we believe unnecessarily.

Thus in disposing of *Watkins v. United States*, 354 U.S. 178, 1 L.Ed. 2d 1273, 77 S. Ct. 1173, much if not all of the majority decision relating to First Amendment rights was dicta. Whether or not Communism is un-American (which it most certainly is in the fullest sense of the word), all that was necessary to disposition in *Watkins* was to require that without writing the questions in advance the House and Senate Committees engaged in security investigation rewrite the resolutions empowering their

membership to act, so as to set forth more clearly precisely their charter. In *Konigsberg* v. *California*, 353 U.S. 252, 1 L.Ed. 2d 810, 77 S. Ct. 722, it was not essential to decision to say that there was no reasonable doubt about the good moral character of an applicant for admission to the California bar who refused to tell the bar examiners whether or not he was then a member of the Communist Party. The repeated assertions by implication and otherwise of dicta in *Konigsberg* that the Communist Party is a mere political organization on a par with and entitled to the same First Amendment protections as the Republican or Democrat or Socialist parties fly in the face of fact and in the teeth of history, past and present.

No greater invasion of the reserved powers of the States has ever been pronounced than in *Pennsylvania* v. *Nelson*, 350 U.S. 497, 100 L.Ed. 640, 76 S.Ct. 477, when the Constitution was interpreted to give to the federal government the power to take from the States their right to protect themselves. Again this extreme was unnecessary to resolve the case in the face of the trial record in Pennsylvania, which was replete with reversible error in the bitter exchanges between Steve Nelson and Judge Mussmano.

Moreover, in spite of Appellant's attempt to interject the segregation issue in the prineipal case (see Appellant's brief, p. 13), it is not involved here. Compulsory disclosure of membership in the NAACP is an entirely different proposition from compulsory disclosure of membership in an organization being investigated for *subversion* for reasons so obvious on this record as to require no argument.

Orderly investigation neither narrows, stultifies nor limits the fullest of free discussion, association, or debate of public issues at World Fellowship, Inc., or any other place. Communist activities throughout the United States should be constitutionally discouraged in the public protection. Appellant now seeks here a decision from this Court that the State of New Hampshire—and *a fortiori*, every other State in the Union—may not even investigate subversion (Communist activity) within the State with

the aid of compulsory process. It has been said that the matter of criminal proscription of such activity is for the federal government and that the F.B.I. stands ready to protect the States. Meaning no disrespect of that great, diligent and loyal body of federal agents, limited in number and burdened with many duties, the State of New Hampshire respectfully inquires what if they do not see fit to act? What if the Justice Department does not see fit to prosecute? Must each State stand idly by should Communist conspiracy within its borders grow and flourish? The law in this field should not remain so phrased that instead of encouraging partnership between the states and the federal government in the detection and regulation of threats to national and state survival, the States and the Federal Government must be at odds, or at arms length in security cases.

Such dicta gives encouragement to public acceptance of the concept that Communism in this country is something different than it is in every other country in the world. Contrary to the spirit of partnership in common cause—which the United States Department of Justice requested of this Court in its brief filed with this Court at this Court's request in *Commonwealth of Pennsylvania* v. *Steve Nelson*, 350 U.S. 497, 100 L.Ed. 640, 76 S. Ct. 477,—the law enforcement agencies of State and Federal Governments have been stripped of the power of partnership and denied common cause in reasonable protective investigative procedures. In this language is the seed of a new Federal paternalism in which the position of the States has been reduced to that of the stool pigeon in the field of criminal law. Apparently Appellant presses here for a new decision that all the States can do is tell the federal authorities of suspected subversion and if the federal authorities don't wish to act, it is just too bad.

The State of New Hampshire respectfully contends that this situation is not good for New Hampshire or for any other State. The confusion compounded by apparent encouragement of Communist activity and by the language of these dicta should be clarified and a reasonable firmness announced in dealing with a genuine threat to state and nation. It accomplishes nothing to deny its existence nor to pooh-pooh it as of negligible concern.

New Hampshire does not so view it. Surely a State is entitled to be concerned in regard to its own internal security.

In this cause we respectfully ask nothing more and nothing less than that the Legislature of the State of New Hampshire be permitted the information from Appellant that has been requested by the subpoenas presently before this Court. The information is readily available on 3 x 5 cards in the possession of the witness. It is ready in the form of correspondence with less than twenty persons.

While the witness says it is an unreasonable interference with his right of privacy, it should be noted that the witness was summoned as Executive Director of a voluntary corporation in his official capacity. The witness says there was no subversion, but as is well known subversion sometimes has a dulcet tone and a myriad of expressions. The State is entitled to know whether the witness here, whose own testimony of sympathetic association and work within many organizations cited as Communist-controlled or infiltrated, sought by the operation of his voluntary corporation in New Hampshire to aid the spread of Communism in New Hampshire.

Such an inquiry is reasonable. Freedom of speech and association in America today—1958—is not absolute in relation to the possible establishment within the States of spearheads of the International Communist apparatus. Positively, there is no room in our law within which to sanction freedom of Communist activity in New Hampshire from even *investigation* in the name of the First Amendment to the Federal Constitution.

The Communist Party has twice been found by a responsible governmental agency not to be a political party but to be the arm of a foreign criminal conspiracy. The Supreme Court in West Germany so held where the Party was outlawed by judicial decision of August 17, 1956. The second finding of criminal conspiracy of the American Communist Party by the Subversive Activities Control Board is now pending before this Court. This country may not have yet suffered the lot of Germany or South Korea, but the handwriting of International Communism is on the wall for all of us to read.

The right of one of the United States—and still a sovereign State—to reasonably investigate such activity within its borders is a power and right reserved to it under the U.S. Constitution which Respondent respectfully asks this Court to affirm in clear and decisive language.

ARGUMENT

I. THE STATE'S POWER TO INVESTIGATE IS FUNDAMENTAL.

A. *The fact-finding process is an indispensable adjunct to intelligent legislation.*

The power of the legislative branch to investigate in aid of legislation has never been seriously doubted.

Kilbourn v. *Thompson*, 103 U.S. 168, 26 L. Ed. 377, 13 Otto 168

McGrain v. *Daugherty*, 273 U.S. 135, 71 L. Ed. 580, 47 S. Ct. 319

Sinclair v. *U. S.*, 279 U.S. 263, 73 L. Ed. 692, 49 S. Ct. 268

Jurney v. *McCracken*, 294 U.S. 125, 79 L. Ed. 802, 55 S. Ct. 375.

Of all possible subjects of State legislation the most appropriate and most essential is that of self-preservation. It has long been held that the power to maintain internal security is the most basic element of sovereignty.

Gilbert v. *Minnesota*, 254 U.S. 325, 65 L. Ed. 287, 41 S. Ct. 125

Whitney v. *California*, 274 U.S. 357, 71 L. Ed. 1095, 47 S. Ct. 641

Gitlow v. *New York*, 268 U.S. 652, 69 L. Ed. 1138, 45 S. Ct. 625

Dennis v. *U. S.*, 341 U.S. 494, 95 L. Ed. 1137, 71 S. Ct. 857

It is equally well recognized that the Federal Government and that of the several States may act seasonably in self-preservation and need not wait until a subversive group has perfected its plans and only the signal to strike remains. Appropriate action may be taken at the appropriate time. *Dennis* v. *U. S., supra; Gitlow* v. *New York, supra.*

> "Overthrow of the government by force and violence is certainly a substantial enough interest for the Government to limit speech. Indeed, this is the ultimate value of any society, for if a society cannot protect its very structure from armed internal attack, it must follow that no subordinate value can be protected. If, then, this interest may be protected, the literal problem which is presented is what has been meant by the use of the phrase 'clear and present danger' of the utterances bringing about the evil within the power of Congress to punish.
>
> Obviously, the words cannot mean that before the Government may act, it must wait until the putsch is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required. The argument that there is no need for Government to concern itself, for Government is strong, it possesses ample powers to put down a rebellion, it may defeat the revolution with ease needs no answer. For that is not the question. Certainly an attempt to overthrow the Government by force, even though doomed from the outset because of inadequate numbers or power of revolutionists, is a sufficient evil for Congress to prevent. The damage which such attempts create both physically and politically to a nation makes it impossible to measure the validity in terms of the probability of success, or the immediacy of a successful attempt."
>
> *Dennis* v. *U. S.*, 341 U. S. 494, 509, 95 L.Ed. 1137, 1152.

It follows that the Legislature, through its appropriate committees, has the power to inquire into the general subject of subversion and the specific subjects of Communism and the Communist Party as an adjunct to its power to legislate with respect thereto.

American Communications Assn. v. *Douds*, 339 U. S. 382

Osman v. *Douds*, 339 U. S. 846

Galvan v. *Press*, 347 U. S. 522

Harisiades v. *Shaughnessy*, 342 U. S. 580

Carlson v. *Landon*, 342 U. S. 524

Adler v. *Board of Education*, 342 U.S. 485

Communist Party v. *Subversive Activities Control Board*, 223 F. 2d 531 (C.A.D.C.), reversed on other grounds, 351 U.S. 115, cf.

Dennis v. *United States*, 341 U. S. 494

Clearly then the investigation undertaken by the Attorney General acting as a constitutional one-man legislative committee was a valid exercise of authority by the New Hampshire Legislature dealing with a subject matter undeniably within its jurisdiction.

B. *The decision of this Court in Pennsylvania* v. *Nelson, 350 U. S. 497, 100 L. Ed 640, 76 S. Ct. 477 (1956) has no application to this case.*

That holding was directed at "suspending the enforceability" of *State* laws imposing criminal sanctions on subversive activity directed against the *Federal* government. All that is involved here is the right of a State to *investigate* in aid of state legislation. Nothing in *Pennsylvania* v. *Nelson* remotely purports to invalidate State legislative *investigations*. In fact in the *Nelson* decision this Court was quite careful to point out that it did not void provisions of State law insofar as they made it a crime in the States to attempt to overthrow the Federal government by

unlawful means but merely suspended their enforceability while the Federal *Smith Act* remained on the books. The decision in *Pennsylvania* v. *Nelson* did not invalidate or suspend State laws aimed at sedition or subversion against the *States* themselves. Chief Justice Warren, writing for the majority, expressly said:

> "The precise holding of the Court, and all that is before us for review, is that the Smith Act of 1940, as amended in 1948 which prohibits the knowing advocacy of the overthrow of the Government of the United States by force and violence, supercedes the enforceability of the Pennsylvania Sedition Act which proscribes the same conduct." 350 U.S. 497, 499.

Pennsylvania v. *Nelson, supra,* does not preclude the *investigation* undertaken by the Appellee pursuant to directive of the New Hampshire Legislature. It is respectfully asserted that Congress could not constitutionally supersede the reserved police power of the States to make it a crime to advocate or seek to overthrow the STATES themselves by force and violence. *U. S. Constitution, Tenth Amendment.* Deprivation of the ability to protect itself by the imposition of criminal sanctions directed toward the restraint of subversion of the State Government is a power not granted to the Federal Government in any part of the U. S. Constitution, expressly or by implication.

See: *Note,* 67 *Harvard Law Review,* No. 8, p. 1419.

The decision in *Yates* v. *U. S.*, 354 U. S. 298, 1 L. Ed. 2d 1356, 77 S. Ct. 1064, does not control the case at bar. *Yates* arose out of a prosecution for violation of the *Smith Act* and the reversal of conviction in the lower court revolved primarily around the definitions of certain terms in the Smith Act.

Moreover, the principal investigation is relevant to a great variety of legislation, none of which necessarily intrudes upon the area construed by this Honorable Court in *Pennsylvania* v. *Nelson, supra,* to have been preempted by Congressional enactment of the Smith Act. The results of this investigation might well lead to the enactment of State immunity laws, registration

statutes, legislation empowering a State agency to suspend or revoke the franchise of corporations engaged in subversive activities within a State, local measures to deal with subversive instigation of riots, insurrection or public disturbance, or any new or amended State legislation directed exclusively at attempts to overthrow the State government itself by force and violence, as distinct from subversion against the national government. In short, there is an infinite variety of permissible State legislation which might logically result from facts developed by the investigation at hand. Contemplation of these possibilities clearly illustrates why this Court in its wisdom confined the decision in *Pennsylvania* v. *Nelson* to sedition directed against the United States, as well as why principles of that case should not be extended to cover a State investigation.

It is not essential to show that legislation has actually been recommended by a committee to prove that it has been pursuing a valid legislative purpose.

United States v. *Josephson*, 165 F.2nd 82, 89-90, certiorari denied, 333 U. S. 838.

Townsend v. *United States*, 95 F. 2d 352, 355, certiorari denied, 303 U. S. 664.

The committee might well find, as a result of its investigation, that no legislation is required or even that existing legislation is unnecessary.

See: Landis, "Constitutional Limitations on the Congressional Power of Investigation" 40 *Harvard Law Review* 153, 208-209, 217-218 (1926)

It is sufficient that some valid legislation could ensue from an inquiry. *McGrain* v. *Daugherty*, 273 U.S. 135, 177; *Sinclair* v. *United States*, 279 U. S. 263, 295; *Barsky* v. *United States*, 167 F. 2d 241, 245, (C.A.D.C.), certiorari denied, 334 U.S. 843. See also Brief for the United States in *Flaxer* v. *United States*, No. 60, this Term. at pp. 38-40, 49-50.

Legislation has in fact been recommended and enacted resulting from the principal investigation. See; Report of Attorney General to New Hampshire General Court, January 5, 1955; New Hampshire Laws 1955, chaps. 181, 312; New Hampshire Laws 1957, chap. 178.

It is clear that the mere possibility that unconstitutional legislation might eventuate from an otherwise legitimate legislative inquiry cannot invalidate the inquiry itself. *Barsky* v. *United States, supra at* 245, *United States* v. *Josephson,* 165 F. 2d 82, 91-92 (C. A. 2), certiorari denied 333, U. S. 838.

The fact that the inquiry goes into the question of names of individuals does not invalidate it. "If Congress has the power to inquire into the subjects of Communism and the Communist Party . . . it has power to identify the individuals who believe in Communism and those who belong to the Party. The nature and scope of the program and activities depend in large measure upon the character and number of their adherents. *Personnel is part of the subject.* [Emphasis added.] *Barsky* v. *United States,* supra at 246.

II. THE SUBPOENAS ARE RELEVANT.

A. *The association and activities with Communist, Communist-infiltrated, and Communist-controlled organizations on the part of the witness and of many known speakers or guests at World Fellowship, Inc., are demonstrated in the record.*

The range of questioning and of information and materials sought is always subject to the requirement of relevancy.

U. S. v. *Orman,* 207 F. 2d 148 (1953)

U. S. v. *Josephson,* 165 F. 2d 82 (1947)

U. S. v. *Rumely* 345 U. S. 41 (1953)

Barenblatt v. *U. S.* 100 App. (DC) 13, 240 F. 2d 875

McGrain v. *Daugherty*, 273 U. S. 135 (1927)

In re Chapman, 166 U. S. 661 (1897)

See Liacos, "Rights of Witnesses before Congressional Committees" 33 *B. U. Law Review* 337 (1953)

The relevancy of questions asked by an investigating committee is not to be determined solely by the standards applicable at the trial of issues in court "because of the scope and purpose of (legislative) investigations, pertinency . . . is necessarily broader than relevancy in the law of evidence." *U. S.* v. *Orman*, 207 F. 2d 148, 153. If the question asked or material sought is directed at a possible answer which would be reasonably concerned with the main object of the investigation, it is relevant. *U. S.* v. *Orman*, supra at 154; see also *Sinclair* v. *U. S.* 279 U.S. 263, 299.

The State Supreme Court in the instant case found the information sought by Appellee's subpoena of the guest registration list and the correspondence with or concerning speakers at the Center was clearly relevant to the legislative inquiry. *Wyman* v. *Uphaus*, 100 N. H. 436. (See Appendix A) So did the Superior Court after full hearing and *before* the witness was directed *by the Court* to respond to the subpoenas here in question.

One of the duties of the legislative committee under its precept in the principal case (*New Hampshire Laws 1953, chapter 307*) was to determine whether or not any subversive organization or persons might be found in the State of New Hampshire. *RSA 588, section 1* defines "subversive person" as:

> ". . . any person who commits, attempts to commit or aids in the commission, or advocates, abets, advises or teaches, by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, *or of the state of New Hampshire*, or any political subdivision of either of them, by force, or violence . . ." (emphasis added)

By the subpoenas in this case the Attorney General sought to determine if such persons might be found in the State of New Hampshire. The definition of "subversive person" is carefully delineated in the statute. It is not a "Watkins" statute. *Cf.*, *Watkins* v. *U. S.*, 354 U.S. 178, 1 L. Ed. 2d 1273, 77 S. Ct. 1173 Request for the names of those in attendance at World Fellowship, Inc., could not be more pointedly related to the discovery of such persons. The principles of *Wieman* v. *Updegraff*, 344 U. S. 183, 97 L. Ed. 216, 73 S. Ct. 215, are not applicable. *Wieman* involved a prosecution (not an investigation) wherein a State law sought to attach criminal penalties to innocent and unknowing activity. In no manner does the basic New Hampshire statute do this. *RSA* 588. Investigation is not prosecution. The witness is not a criminal defendant except insofar as he has refused to honor the subpoenas in question and thereby committed a contempt of the Superior Court of Merrimack County, New Hampshire.

B. *The materials called for by the subpoenas are neither burdensome nor indefinite.*

The subpoenas before this Honorable Court each cover only a period of less than one year preceding their issuance. They are limited to the summer season and activities of World Fellowship, Inc., of which Appellant is the Executive Director. They call for names of registrants and a guest registration list which is in existence in readily available form on 3" x 5" cards. Correspondence called for by the subpoenas is particularly described as being that between the Executive Director and persons who participated as leaders of discussions, panels, or principal speakers at World Fellowship, Inc., over a period of but a few weeks. Nothing in the subpoenas is unreasonable as to time, place or persons.

See *Annotations* 58 *A.L.R.* 1263.

58 *Am. Jur.*, "Witnesses" ss. 20, 21, 25

70 C.J. 50, "Witnesses" s. 37

III. COMPLIANCE WITH THE SUBPOENAS DOES NOT VIOLATE THE FIRST OR FOURTEENTH AMENDMENTS.

A. *The New Hampshire Legislature desires the information requested by the subpoenas.*

In the case of *Sweezy* v. *New Hampshire*, 354 U.S. 234, 1 L. Ed. 2d 1311, 77 S. Ct. 1203, this Honorable Court was evenly divided on the question of the scope of the Attorney General's authority. The principal opinion stated that:

> "The Attorney General has been given such a sweeping and uncertain mandate that it is his decision which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. In this circumstance, it cannot be stated authoritatively that the legislature asked the Attorney General to gather the kind of facts comprised in the subjects upon which the petitioner was interrogated" . . .
>
> "The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from the petitioner must be treated as the absence of authority. It follows that the use of the contempt power, notwithstanding the interference with Constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment."

The concurring opinion, however, took issue with this reasoning:

> "In assessing the claim of the State of New Hampshire to the information denied it by petitioner, we cannot concern ourselves with the fact that New Hampshire chose to make its Attorney General in effect a standing committee of its Legislature for the purpose of investigating the extent of 'subversive' activities within its bounds . . . Similarly, whether the Attorney General of New Hampshire acted within the scope of the authority given him by the State Legislature is a matter for the decision of the courts of that

State, as it is for the Federal courts to determine whether an agency to which Congress has delegated power has acted within the confines of its mandate. See *U. S.* v. *Rumely*, 345 U.S. 41, 97 L.Ed. 770, 73 S. Ct. 543. Sanction of the delegation rests with the New Hampshire Supreme Court and its validation in *Nelson* v. *Wyman*, 99 N. H. 33, 105 A2d 756, is binding here."

The dissenting opinion agreed with the concurring opinion in this regard:

"They [the Justices sharing the principal opinion] hold that the appointment of the Attorney General to act as a committee for the Legislature results in a separation of its power to investigate from its 'responsibility to direct the use of that power' and thereby 'causes deprivation of the constitutional rights of individuals and a denial of due process . . . ' This theory was not raised by the parties and is, indeed, a novel one."

"My Brothers Frankfurter and Harlan do not agree with this opinion because they conclude, as do I, that the internal affairs of the New Hampshire State Government are of no concern to us. See *Dreyer* v. *Illinois*, 187 U. S. 71, 84, 47 L.Ed. 79, 85, 23 S. Ct. 28 (1902)."

Assistant Professor Cramton of the University of Chicago Law School in his article entitled "Limitations on State Power to Deal with Issues of Subversion and Loyalty" had this to say with respect to the *Sweezy* case:

"The most puzzling aspect of the Sweezy case is the reliance by the Chief Justice on delegation of power conceptions. New Hampshire had determined that it wanted the information which Sweezy refused to give; to say that the State has not demonstrated that it wants the information seems so unreal as to be incredible. The State had delegated power to the Attorney General to determine the scope of inquiry within the general subject of subversive activities.

Under these circumstances the conclusion of the Chief Justice that the vagueness of the resolution violates the due process clause must be, despite his protestations, a holding that a state legislature cannot delegate such a power."

This quotation was cited with approval in the Report of the Committee on Federal-State Relationships as Affected by Judicial Decisions adopted by a 36 to 8 vote by the 1958 Conference of Chief Justices.

As a practical matter the New Hampshire Legislature specifically answered the question as to whether or not the Attorney General's inquiries into the Sweezy case were directed towards information desired by them on July 12, 1957, when by more than a two-thirds vote, the General Court of New Hampshire adopted the following resolution:

"Senate Joint Resolution
relative to interpretation of legislative intent
on subversive activities.

"Whereas, the attorney general has for several years been conducting a fact-finding investigation of subversive activities in New Hampshire for the General Court pursuant to law, and

Whereas, by the laws of this state the attorney general for these purposes has been found by the Supreme Court of New Hampshire to be a constitutionally delegated legislative committee of this body, and

Whereas, in the course of the aforesaid investigation one Paul M. Sweezy refused to respond to questions of the attorney general which questions and report thereof was made by the attorney general to this legislature on January 5, 1955, and

Whereas, in decreeing the questions put to Sweezy were put without authority the United States Supreme Court on June 17, 1957 stated that

'The lack of any indications that the Legislature wanted the information the attorney general attempted to elicit from petitioner must be treated as the absence of authority.'

"Now therefore, be it

Resolved by the Senate and House of Representatives in General Court convened:

That this general court is, and for a long time has been, familiar with the questions put to Paul M. Sweezy by the attorney general acting in this State, authorized these questions, wanted and continues to want the information which is sought by these questions, and has enacted this resolution for the specific purpose of removing the doubt which has been expressed by the United States Supreme Court '. . . neither we nor the State Courts have any assurance that the questions petitioner refused to answer fall into a category of matters upon which the Legislature wanted to be informed when it initiated this inquiry.'"

If it be contended that this Resolution purports to operate retroactively, it is nevertheless incontrovertible evidence of the intention of the Legislature with regard to the principal inquiry, which is an uninterrupted continuation of the same legislative investigation since 1953. It is important to note that the principal opinion in *Sweezy* rests entirely upon a determination that:

"the lack of any indication that the Legislature wanted the information the Attorney General attempted to elicit from the Petitioner must be treated as the absence of authority."

What stronger indication of the Legislature's intent could exist than a specific statement thereof by the Legislature itself? The authority of the Committee (Attorney General) is a continuing matter (New Hampshire Laws 1957 Chapter 347) and the General Court has directed that it "continues to want" the information in question.

The New Hampshire Supreme Court entertained no doubts as to the intention of the Legislature with regard to the Attorney General's scope of authority,

> "The legislative history makes it clear beyond a reasonable doubt that it [the Legislature] did and does desire an answer to these questions. Laws 1957, Chapter 347 Approved July 11, 1957. We believe that the legislature was entitled to the information sought." *Wyman* v. *Uphaus*, 101 N. H. 139.

The decision in the *Sweezy* case fundamentally differs from the case at bar in several respects. This case does not concern itself with the classroom. Both the principal and concurring opinions in *Sweezy* express concern lest the investigation might interfere with the academic process. No such consideration need enter the decision in this case.

The Sweezy decision in part concerned questions having to do with Communist influences within the Progressive Party. The concurring opinion considered this to be a pivotal point and concluded that insufficient evidence existed in the record which would justify the conclusion that the Progressive Party constituted a danger to the security of New Hampshire. This case is not related to the Progressive Party. It has to do with the production of certain correspondence and a guest registration list of Petitioner's state-incorporated public camp. In this connection it is worthy of note that since 1927 a provision has been in force in the State of New Hampshire specifying as follows:

> "All hotel keepers and all persons keeping public lodging houses, tourist camps, or cabins shall keep a book or card system and cause each guest to sign therein his own legal name or name by which he is commonly known. Said book or card system shall at all times be open to the inspection of the sheriff or his deputies and to any police officer." New Hampshire Revised Statutes Annotated Chapter 353, section 3.

For thirty-one years this statute has been on the books in New Hampshire and undoubtedly similar provisions are in force in most of the forty-eight States. No one during that entire period has seriously questioned the constitutionality of this rather innocuous law which operates in the public interest. Certainly if any power were within the scope of a simple police regulation this is such a power. Any deputy sheriff or local police officer is entitled to the same information as that sought by the Attorney General of the State of New Hampshire acting in pursuance of a direct order of the entire legislative assembly of that State. Appellant's position that New Hampshire must afford those who seek to subvert and overthrow the State a constitutional government immunity from the equivalent of one of New Hampshire's police regulations is patently outrageous.

B. *Reasonable and rational balancing of the interests of State security and individual rights requires that in the limited circumstances of the principal case the witness produce the information called for.*

In *Sweezy* v. *New Hampshire*, 354 U.S. 234, the principal opinion declared that it did not need to consider the fundamental question of whether "the menace of forcible overthrow of the government justified sacrificing constitutional rights." The concurring opinion on the other hand held that the true question in that case involved ". . . a judicial judgment in balancing two contending principles—the right of a citizen to political privacy, as protected by the Fourteenth Amendment, and the right of the State to self-protection." The opinion went on to state that "it [the decision] must rest on fundamental presuppositions rooted in history to which widespread acceptance may be firmly attributable." Thus has this Court clearly indicated the principal issue which the present case must determine. The fundamental question is whether or not the invasion of petitioner's rights (if the subpoenas in this case can be so deemed) is justified by the danger with which the State finds itself faced. The concurring opinion in *Sweezy* takes a long step towards answering

this question. There it was strongly intimated that at least a portion of this Court recognizes the menace to the free world presented by International Communism.

> ". . . on the basis of massive proof and in the light of history of which this Court may well take judicial notice be the justification for not regarding the Communist Party as a conventional political party . . ."

The concurring opinion went on to point out that such proof and history were not available with regard to the Progressive Party and therefore reached the conclusion that the questions asked in the *Sweezy* case relative to the Progressive Party were not justified by the State's interest in self protection. We continue to believe that a careful examination of the record in that case evidenced such justification. In the case at bar, however, the facts occur in a different setting. This case does not concern itself with the classroom nor with the Progressive Party or any other recognized political party. The distinction between the Communist Party and the Progressive Party is vital. Whatever view one may have as to the character of the Progressive Party as a legitimate political party the Legislature has the gravest of reasons for not considering the Communist Party as a political party in the conventional and accepted sense.

> "From information before its several Committees and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends and to use methods which are incompatible with our constitutional system." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 424.

Its goal is "*to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate*" (id., 425; italics in the original) It "purposes forcibly to recast our whole social and political structure after the Muscovite model of police-state dictatorship" (*ibid.*). It is

"designed to undo the Declaration of Independence, the Constitution, and our Bill of Rights, and overturn our system of free, representative self-government" (*ibid.*) *"Violent and undemocratic means are the calculated and indispensable methods to attain* (its) *goal"* (339 U. S. at 429; italics in the original). It is "a secret conclave. Members are admitted only upon acceptance as reliable and after indoctrination in its policies, to which the member is fully committed" (at 432). Each member "pledges unconditional obedience to party authority. Adherents are known by secret or code names. They constitute 'cells' in the factory, the office, the political society, or the labor union. For any deviation from the party line they are purged and excluded" (*ibid.*). It, moreover, *"alone among American parties past or present is dominated and controlled by a foreign government.* It is a satrap party which, to the threat of civil disorder, adds the threat of betrayal into alien hands" (at 427; italics in the original).

The United States Congress in the Communist Control Act of 1954, c. 886, §2, 68 Stat. 775, 50 U.S.C. (Supp. V) 841 stated its reasons for not considering the Communist Party as simply "another political party".

> "The Congress finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the World Communist movement. Its members have no part in determining its goals, and are

not permitted to voice dissent to party objectives. Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives and methods, and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Communist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services."

This formal expression by Congress of its views respecting the Communist Party is manifestly entitled to great weight in any judicial appraisal of the validity, under the First Amendment, of a legislative inquiry.

The special nature of the Communist Party, the special dangers it represents, and its special and unlawful aims, justify inquiry into an individual's connection with that Party where other political queries would be inadmissible. This principle the Court has explicitly recognized. *Lerner* v. *Casey*, 357 U.S. 468, 477-478. It is too late in the twentieth century to treat Communist Party membership as if it were of the same type and order as membership in the Republican Party, Democratic Party, or the Socialist Party. The established fact is that Com-

munist affiliations are on a wholly different plane because the Communist Party is wholly different—and this Court has never held otherwise.

The information sought by the Attorney General (committee) here deals with a group of persons connected with an organization which Petitioner described in high-sounding, self-serving terms (*Wyman* v. *Uphaus*, 100 N. H. 436, 438) *but the true nature of which is the very point under investigation by the State.* Information in the hands of the Attorney General and a matter of record in this case clearly indicates that World Fellowship, Inc. was in all probability a breeding ground for the precise type of activity at which the New Hampshire Legislature aimed its investigation. The weight of this evidence was such that the New Hampshire Supreme Court upon careful consideration concluded that:

> "we believe this contention [that the guest list and correspondence did not contain any information relative to subversion] so unrelated to reality that it requires no further answer than the above recital of some of the information possessed by the Attorney General and the law applicable to the same." *Wyman* v. *Uphaus*, supra, at 494, citing *Flaxer* v. *U. S.*, 235 F.2d 821; *Marshall* v. *U. S.*, 176 F.2d 473; *Morford* v. *U.S.* 176 F.2d 54.

Specifically what does the record reveal with respect to the need of the State for this information?

1. That the witness, Willard Uphaus by his own testimony has been a member or sponsor of many organizations which persons in positions of responsibility in the United States have believed to be Communist infiltrated or Communist controlled, and hence at the very least potentially subversive within the language of the New Hampshire statute under which the present subpoenas were issued. (See Appendix A)

2. That the witness, Uphaus, by his own testimony did not know whether many of the individuals attending World Fellowship, Inc. during 1954 and 1955 were presently or had been in the past members of the Communist Party and/or members of organizations cited as subversive and Communist controlled, and never inquired into their "political affiliations".

3. That among those whom the record shows attended and spoke at World Fellowship, Inc., were: Dirk Struik, Julian Shuman, John Prati Whitman, Florence Luscomb, Janet Sharp, Anne Winston, Carl Ryan, Thelma Dale, J. Franklin Pineo, Ruth Crawford, Richard Morford, Mary Jane Keeney, Helen and Scott Nearing, etc., many of whom have substantial public records of membership in organizations repeatedly cited as subversive or Communist controlled. (See Appendix A)

4. That there are files of correspondence with persons invited to speak at World Fellowship, Inc. which the witness recognized as under *subpoena duces* "regardless of whether the correspondence was with (a person who) . . . was or was not a Communist." (T. 75)

It is important to observe that the bulk of the evidence relied upon by the New Hampshire Supreme Court in its decision was taken directly from petitioner's own testimony. Even a cursory examination of this testimony will reveal unmistakable indications of the probable presence at World Fellowship, Inc. of persons with exactly such information as the legislative inquiry so obviously seeks.

As a matter of practical application the balancing process referred to by the Court in *Sweezy* fairly requires consideration of the fact that a certain amount of preliminary investigation is essential in order to determine the existence and extent of a suspected danger.

See: Note, "The Supreme Court, 1956 Term", 71 *Harvard Law Review* 146.

If examination of the guest list were to disclose Communist agents hitherto unknown or lead to the discovery of a plan of sabotage or uncover an organization actively engaged in espionage for a foreign power, the State's interest would be deemed clear and uncontrovertible. The danger in such circumstances to the State would undeniably justify almost any intrusion by relevant question and required answer.

Every indication points to the conclusion that World Fellowship, Inc. is an incubation spot for precisely this type of activity yet Appellant seeks from this Court a decree that The State of New Hampshire is not entitled to even the names of those in attendance. Careful preliminary investigation is as essential a step in the security of State and Nation as the production of arms and the maintenance of a standing army.

The courts have been mindful that a legislative inquiry need not be restricted to those facts which prove the need for new legislation or for modification of existing laws; nor is it limited to the precise area which the legislative body has power to regulate. The power to investigate must necessarily be broader than the substantive authority which may eventually be exercised by the investigating body, for not until the whole body of facts has been canvassed can it be determined where the definite boundaries of regulation should be drawn. It is just as important for the Legislature to be informed of facts which show proposed or possible legislation would be undesirable or uncessary, as it is for it to know the circumstances calling for affirmative action. In many areas, such as those impinging on freedom of speech or other constitutionally protected rights the legislative power may even depend upon the existence, or non-existence, of facts which can only be uncovered through a legislative inquest.

Judicial inquiry into a committee's "legislative purpose" should therefore not be restrictive or hostile, but must take account both of the powers of the legislature and of its pressing need to inform itself broadly. The latitude is necessarily wide. As was stated in *Townsend* v. *United States*, 95 F. 2d 352, 361 (C.A.-D.C.), certiorari denied, 303 U.S. 664:

> A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress. *McGrain* v. *Daugherty*, 273 U.S. 135. . . . A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad. (Emphasis in the original.)

"Clearly," as was observed in *United States* v. *Josephson*, 165 F. 2d 82, 92-93 (C. A. 2), certiorari denied, 333 U. S. 838, "the Congressional power to investigate is as flexible as its power to legislate, once the latter power is established."

Thus, if this Court is to undertake a balancing between Appellant's rights and the danger to the State, it is only fair to the State to recognize that the reality and seriousness of the danger it seeks to analyze and assess is the very subject under investigation by the State. All that the State is able to present to the Court are those indications which led it to undertake the investigation in the first instance. At this stage of proceedings it is unreasonable to expect or require proof positive of espionage, sabotage, treason or criminal conspiracy constituting a serious menace to the State, for if such evidence were in the hands of the State this would not be an investigation but a prosecution or at the very least an information to the Department of Justice. It is appropriate that determination be made whether the information in the hands of the State reasonably justified the suspicion that the activities at Appellant's camp were subversive and therefore might constitute a danger to the State. Yet a State must not be forced to wait until a danger has become *fait accompli*, but must be permitted to administer that ounce of prevention (or at the very least *detection*) which is the *raison d'etre* of this investigation.

There is nothing shadowy or remote in the threat to the security of New Hampshire and that of each of the several States as well as the Federal Government presented by the presence

within its borders of persons whose entire record indicates consistent support of, and affiliation with Communism from the Communist Party to Communist-infiltrated and front organizations. Consideration of the aims of International Communism cannot fail to make manifest a serious threat to any and all political subdivisions of a free society in such activity. Any other conclusion would not constitute a realistic appraisal of the Communist *modus operandi*.

Current developments on the international as well as the national scene resoundingly justify the concern of The State of New Hampshire in what is going on at World Fellowship, Inc. As the "cold war" erupts from time to time across the face of this troubled world into shooting war in Quemoy, Matsu and Formosa and in the Middle East, and not so long ago in the bloody Hungarian Revolution, and in other incidents too numerous to name, the role played by Communists working through international subversion can not be ignored.

The New Hampshire General Court does not look upon the question of Communism and Communist Party activity within the State as some kind of conventional political association or mere political activity. We are unwilling to risk inactivity or non-activity by Federal authorities. We sincerely feel that the States must have the right to make subversive advocacy a crime within the State and on the State level, no matter whether the Federal Government does or not. We feel that New Hampshire as a separate and sovereign State still retains *some* of the rights reserved to the States under the *Tenth Amendment*. We feel that if any rights at all are reserved to the States thereunder, that the most basic is the power to investigate and control subversion and to compel answers to fair, reasonable, courteous and relevant questions such as are involved in the subpoenas before this Honorable Court. See Appendix B for Rules of Procedure used in the principal investigation.

It is impossible to rationally maintain that the information sought is not pertinent. It is impossible to rationally conclude that no interest in The State of New Hampshire in its survival warrants the miniscular limitations on absolute freedom of speech

that are claimed by Appellant here. Daily faced with the risk of war with International Communism, it is submitted that a reasonable balance of the State's interest and the individual's rights can have no other conclusion than a decision in favor of Appellee *on this record.*

IV. AN ORDER OF CONFINEMENT UNTIL COMPLIANCE WITH THE COURT'S ORDER, WHEN SUCH COMPLIANCE IS POSSIBLE TO THE WITNESS AT ANY TIME, IS NOT A CRUEL NOR UNUSUAL PUNISHMENT.

The use of contempt power of the State's Superior Court in this situation is appropriate and apt. Although liable to abuse, contempt power is essential to the protection of the courts in the discharge of their functions. Without it judicial tribunals would be at the mercy of the disorderly and violent who respect neither the laws enacted for the vindication of public and private rights nor the officers charged with the duty of administering such laws.

Ex Parte Terry, 128 U. S. 289, 313 (1888)

12 *Am. Jur.* "Contempt" s. 40

17 *C.J.S.* "Contempt" ss. 43, 106, 109

This Court has recognized the power of lower courts to impose conditional imprisonment for the purpose of compelling compliance with court orders.

> "We agree that the court had power to coerce obedience to those orders and to subject defendants to such conditional sanctions as were necessary to compel obedience. . . .
>
> This power is of ancient lineage, [footnote omitted] has always been recognized by our courts, and has the express recognition of Congress under the name of contempt. Rev. Stat. § 725, 28 U.S.C.A. § 385, 8 F.C.A. Title 28, § 385. Where the court exercises such coercive power, however, for the purpose of compelling future obedience, those im-

Footnote: Mr. Justice Black went on to disagree with the principal opinion on other grounds, but it should be noted that with regard to the issue at hand he was in accord with the majority opinion.

> prisoned 'carry the keys of their prison in their own pocket,' *Re Nevitt* (CCA 8th 117 F.448, 461;) by obedience to the court's valid order, they can end their confinements; and the court's coercive power in such a 'civil contempt' proceeding ends when its order has been obeyed. *Gompers* v. *Bucks Stove & Range Co.*, 221 U. S. 418, 441-445, 55 L.Ed. 797, 805-807, 31 S.Ct. 492, 34 L.R.A. (N.S.) 874."
> *U. S.* v. *United Mine Workers of America*, 330 U. S. 258, 330-332; 91 L.Ed. 884; 67 S.Ct. 677, 713-714 (dissenting opinion)

More recently, in *Green* v. *U. S.*, 356, U.S. 165, 2 L. Ed. 2d 672, 78 S. Ct. 632, 650, Mr. Justice Black found occasion to dissent from the principal opinion, but once again agreed with the majority on the basic proposition that courts may impose conditional imprisonment in the exercise of contempt powers.

> "Before going any further, perhaps it should be emphasized that we are not at all concerned with the power of courts to impose conditional imprisonment for the purpose of compelling a person to obey a valid order. Such coercion, where defendant carries the keys to freedom in his willingness to comply with the court's directive, is essentially a civil remedy designed for the benefit of other parties and has quite properly been exercised for centuries to secure compliance with judicial decrees." *Green* v. *U.S.*, supra.

Appellant argues that the conditional imprisonment imposed in the instant case constitutes cruel and unusual punishment because "he was not actuated by self-interest or disrespect for the judicial process" in refusing to comply with the Court's order to produce the material requested. Appellent's motives though attested by self-serving statements, are questions of fact for the determination of the trial court and not for consideration on appeal.

Appellant has never been confined. An order that appellant stand committed until purged of contempt is in conformity with settled practice over the years. Such orders are constantly made

in equity proceedings. They are peculiarly apt to the situation presented to the New Hampshire Supreme Court on January 5, 1956, by respondent's willful contumacy. Appellant in any such formula holds the key to his own dilemma. He is not being forced to talk himself into jail nor into a prosecution. He has never claimed the privilege against self-incriminaton. It is unreasonable to give credence to assertions that a claim of stigma attached which is in the nature of an odium. If there is any stigma here (which is perforce moral and not legal in any event) it is directly attributable to appellant's own activity, to his own free choice in life and to an unlawful and unreasonable defiance of the General Court of The State of New Hampshire.

CONCLUSION

There is no sound legal or moral reason why any person in New Hampshire or in any other of the United States should not be required to appear and to testify relative to knowledge of subversive activity, whether on the part of himself or on the part of other persons to his knowledge. If any principle of law can be said to have developed from this and similar investigations, spawned of better understanding by state and nation of the real purposes of world Communism, it is the principle that one of the obligations of American citizenship is to take the witness stand at any time and answer under oath relevant questions involving loyalty to state or nation. If in the course of such questioning there are claims that truthful answers would tend to incriminate, or claims that the particular questioning by manner or method peculiar unto itself violates other constitutional rights, problems thereby raised should never be permitted to cause us to lose sight of one of the most fundamental obligations of citizenship, whether in this decade or a thousand years ago—to tell the truth under oath when questioned concerning loyalty of the witness or loyalty of others within his knowledge.

The New Hampshire legislative investigation has not been concerned with liberalism no matter how liberal; with genuine socialism of the lawful Norman Thomas type no matter how

contrary in theory to prevailing practices of free enterprise; nor with honest dissent from existing social mores or institutions in any form short of subversive doctrines. However, all these things are a part of a spectrum of freedom of speech which, when viewed through a legal prism, approaches a definitive point beyond which the supreme legislative authority has constitutionally said citizens may not pass without breaking the law. A very considerable amount of questioning is absolutely essential to focus the legislative formula upon individual conduct which involves that part of the spectrum very close to the line of unlawful subversive conduct. Only through such questioning is it possible to be able to report to the Legislature whether the activity of a given individual has been subversive or not subversive; whether or not intentionally so or knowingly so on his part.

The witness is not being persecuted. He is not a defendant except for reason of contempt of a court order. He holds the keys to his own dilemma. The information sought by the subpoena is relevant to a vital concern of The State of New Hampshire and is directed to an activity on this record overwhelmingly infiltrated by Communists, fellow-travellers, or sympathizers. Being an investigation of possible subversion against the State, there is involved no question of First Amendment rights nor room to invoke the principles enunciated in *U. S.* v. *Rumely*, 345 U. S. 41, or other cases relating to investigation of lobbying, cartel or interstate commerce. The New Hampshire subversive activities law is constitutional. It is definite. It is carefully written as is the resolution empowering the committee (Attorney General) to investigate. In these circumstances the State of New Hampshire respectfully requests this Court to confirm its right to this information, which the Legislature clearly wants and continues to want and which in no way either stultifies free expression, any genuine freedom of religion, or freedom of assembly, nor otherwise unreasonably interferes with the witness' private life.

Balancing the interests of privacy against the interests of State Security on the record presently before this Court, it is

only fair and reasonable to conclude and hold that in these narrow circumstances this information is relevant to a vital concern of the State and does not abridge any reasonable construction of constitutional rights of Appellant.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE

Louis C. Wyman
Attorney General

APPENDIX A

Information Developed at Hearing in Executive Session Held at State House, Concord, N. H., on June 3, 1954

Pursuant to New Hampshire Laws of 1953, Chap. 307

Organization	*Uphaus' Relation to Same*	*Transcript of Hearing Page No.*
National Religion and Labor Foundation	Executive Secretary — 1934 to ~~1950~~ of 1951	9, 45
American Peace Crusade	National co-director, for two years starting in July 1951 until about Mar. 1952. Member of Resident Board	10, 12, 23, 38
World Fellowship	Executive Director — 1953	11
National Council on American-Soviet Friendship	Contributor	12

Organization	*Uphaus' Relation to Same*	*Transcript of Hearing Page No.*
National Committee for the Protection of the Foreign Born	Contributor	12, 24, 25
Citizens Committee for Harry Bridges (cited as a Communist organization by the Attorney General of the U.S. in 1949)	Sponsor in 1941	16, 17
American Friends of Spanish Democracy	Committee member	18
American Society for Technical Aid for Spanish Democracy	"probably a committee member"	20
Rosenburg Case	Signed a petition for clemency	20
National Committee for Peace	Director for one conference in Washington	20
"New World Review" (formerly "Soviet Russia Today")	Wrote one, possibly two articles for same	21, 22
Civil Rights Congress	Attended public meetings in New York	24
Christian Socialist	Member of party	27
World Council of Peace World Peace Congress	Member, appointed in Nov. 1950—was in Russia for 10 days then	31, 32

Organization	*Uphaus' Relation to Same*	*Transcript of Hearing Page No.*
Interfaith Committee for Peace Action in N. Y. City	Organized Sunday peace vigils	35
Labor Committee to Combat German Rearmanent	Supported committee	41
Congress of People for Peace	Name appears on sponsoring committee letterhead	43
Second World Peace Conference	Attended conference and expenses paid by U.S. Sponsoring Committee to get representation at Warsaw Congress; also attended First Conference in Warsaw—expenses paid by same Committee	45
Mid-Century Peace Conference	Directed same	60
Protestant Digest	Editorial advisor—"maybe I was"	83

See Page 47 of Transcript where Attorney General read a list of organizations, as follows, in which he had reason to believe Uphaus had been active in:

National Committee to Repeal the McCarran Act

National Peace Referendum—sponsor, press release Aug. 1952

Citizens Victory Committee for Harry Bridges

Conference on Peaceful Alternatives to the Atlantic Pact
Methodist Federation for Social Action (official ballot)
Appeal for Amnesty for Eleven Communist Party Leaders
Melish v. Holy Trinity Church et al in Brooklyn, Sup. Ct. of U. S., Amicus curiae brief of clergy.
"Report on Communist Peace Offensive"
W.E.B. DuBois Testimonial Sponsoring Committee, sponsor
Delegates' National Assembly for Peace, initial sponsor
Mid-Century Conference for Peace, sponsor
American Friends of Spanish Democracy—on letterhead
Delegates' National Assembly for Peace—signer of call
U. S. Sponsoring Committee for Representation at Congress of the Peoples for Peace—acting for committee
Rosenberg Clemency appeal—signer
U. S. Sponsoring Committee of the American Inter-Continental Peace Conference—name on letterhead
People's Institute of Applied Religion—sponsor, letterhead
Methodist Federation for Social Action
National Committee for Peaceful Alternatives
Interfaith Committee for Peace Action

Uphaus did not deny his association with any of the above.

Some of the Known oft-cited Guests and Speakers at World Fellowship, Inc.

Dirk Struik
Richard Morford
Florence Luscomb
Ruth Crawford
Prof. Daggett
Prof. Reid
Rev. Abbe
Anne and John Wickman
Rev. Muir
Dr. Roberts
Rabbi Bick
Dr. Kingsbury
Bert MacLeech
Paula MacLeech
Rev. S. Modak
Joseph Hellinger
Dr. Dryden Phelps
Huberman
Joliot-Curie
Izzy Stone
Anna L. Strong
Nathaniel Mills

APPENDIX B

Note: The following Rules of Procedure were adopted by the Attorney General and are applicable to the testimony given by Uphaus at both hearings.

RULES OF PROCEDURE

Investigation of Subversive Activities

Laws of 1953, Chapter 307
New Hampshire

July 1, 1953 *

Explanatory Note

Laws of 1953, chapter 307, providing for the investigation of subversive persons and activities within New Hampshire, authorizes the conduct of hearings at which testimony under oath may be required from anyone in New Hampshire. Conceivably this testimony may raise constitutional questions and other legal problems affecting the rights of witneses, and to eliminate confusion as to the extent and nature of these rights, to clarify the manner of conduct of hearings under chapter 307, the following RULES OF PROCEDURE are published in advance of hearings. It should be recognized that these RULES OF PROCEDURE ARE SUBJECT to modification at any time.

RULES

1. *Executive Session.*

Witnesses in all cases will be first advised of the contents of Laws of 1953, chapter 307, and of their constitutional privilege against self-incrimination. Insofar as is possible, examination of witnesses will be conducted in executive session. *Hearings will not be held in public unless requested by the witness.* Transcripts

* as amended May 5, 1954

of testimony taken in executive session will be made public only when in the opinion of the Attorney General, in each individual case, such publicity is required to effectuate the purposes of Laws 1953, chapter 307. [emphasis added]

2: *Right to Counsel.*

At either executive or public hearings, every witness may have counsel of his own choosing, if desired, Whenever questioned under oath by the Attorney General or any duly authorized member of his staff, a witness shall, prior thereto, be informed of this privilege of counsel. Attorneys not members of the bar of the State of New Hampshire will not be recognized as counsel unless they are associated with a member of the bar of this state in good standing and this associate member of the bar of the State of New Hampshire in good standing shall be present at all times during any hearing, either executive or public, at which a witness requests to be represented by counsel.

3. *Participation of Counsel.*

On behalf of a witness to whom he is counsel, an attorney shall have the right to participate in hearings as follows:

(a) to advise the witness of his legal rights:

(b) to make legal objection to questions and procedures and to submit brief statements in support of such objections, which may be either oral or in the form of memoranda, in which latter event such memoranda may be later filed for record;

(c) although witnesses are not parties and are not entitled of legal right to cross-examine other witnesses, counsel may submit to the Attorney General or to such other authorized member of his staff conducting the hearing, written questions directed to witnesses testifying as to relevant facts substantially derogatory to the reputation and character of his client;

NOTE: This confers no right upon counsel to be present at an executive session (private hearing) when his own client is not testifying, but is confined to public hearings at which testimony is given by others derogatory to his own client; it further confers no absolute right that the questions so written shall be presented if determined by the Attorney General to be irrelevant, scurrilous insulting or impertinent.

(d) to submit as part of the record a written statement of his client, explaining or refuting testimony relating to his client, provided such statement is relevant and not defamatory, but such written statement need not be incorporated in the transcript of hearings. All questions as to qualification of documents, relevancy of material contained therein, and claim of legal right including the relevancy of submitted written questions shall be finally determined by the Attorney General.

4. *Transcript of Testimony.*

An accurate stenographic record shall be kept of the testimony of all witnesses in both exclusive and public hearings. Final determination as to publication of all or part of the testimony given in executive session shall be made pursuant to the authority of chapter 307 by the Attorney General.

Copies of transcripts of public hearings or of transcripts publicly released in lieu thereof shall be available for purchase from the stenographer reporting to same by any person. Witnesses (and counsel) shall have the right to inspect the complete transcript of their own testimony given in executive session but are required to keep such testimony confidential until and unless it is later made public by the Attorney General.

5. *Rules of Evidence.*

Being a fact-finding investigation in aid of the legislative process, judicial rules of evidence will not apply. As far as possible, all evidence shall be relevant and limited to testimony of facts

within the knowledge of the witness. Relevancy, pertinency of questions, and admissibility of evidence, shall be determined by the Attorney General.

6. *Reports Derogatory to Individuals.*

Publication of reports, statements, testimony or findings based thereon, shall not be issued unless found by the Attorney General to be substantially within the purpose of chapter 307 and based upon evidence presented at hearings and under oath.

7. *Television and Radio*

In the event of request to televise or broadcast a public hearing, witnesses summoned to appear and testify thereat shall be notified of such request in writing by the Attorney General not less than twenty-four hours prior to the date set for hearing. Witnesses requesting that their testimony not be televised or broadcast shall have their request granted, provided the request is made not less than twelve hours prior to the date and hour of the hearing.

8. *Service of Subpoena.*

So far as possible, all witnesses summoned to testify either in executive session or at public hearings shall be furnished a copy of these RULES OF PROCEDURE at the time service of subpoena is made.

9. *Public Hearing.*

To protect citizens of the state from irresponsible charges, witnesses are directed to mention the name of no persons in a public hearing until all information concerning those persons in the possession of the witness has been furnished in executive session.

LOUIS C. WYMAN
Attorney General